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(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to § 800.7(c).

(4) If the Council terminates consultation, the Council shall notify the Agency Official, the agency's Federal Preservation Officer and all consulting parties of the termination and comment under § 800.7(c). The Council may consult with the agency's Federal Preservation Officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

(b) *Comments without termination.* The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a Memorandum of Agreement will be executed. The Council shall provide them to the Agency Official when it executes the Memorandum of Agreement.

(c) *Comments by the Council—(1) Preparation.* The Council shall provide an opportunity for the Agency Official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the Agency Official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) *Timing.* The Council shall transmit its comments within 45 days of receipt of a request under §§ 800.7(a) (1) or (3) or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or § 800.7(a)(4), unless otherwise agreed to by the Agency Official.

(3) *Transmittal.* The Council shall provide its comments to the head of the agency requesting comment with copies to the Agency Official, the agency's Federal Preservation Officer, all consulting parties, and others as appropriate.

(4) *Response to Council comment.* The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(1) of the Act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursu-

ant to section 106. Documenting the agency head's decision shall include:

(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

(ii) Providing a copy of the summary to all consulting parties; and

(iii) Notifying the public and making the record available for public inspection.

§ 800.8 Coordination with the National Environmental Policy Act.

(a) *General principles—(1) Early coordination.* Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies should consider their Section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a "major Federal action significantly affecting the quality of the human environment," and therefore requires preparation of an Environmental Impact Statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties. A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

(2) *Consulting party rules.* SHPO/THPOs, Indian tribes and Native Hawaiian organizations, other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.

(3) *Inclusion of historic preservation issues.* Agency Officials should ensure that preparation of an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) and an EIS

and Record of Decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.

(b) *Actions categorically excluded under NEPA.* If a project, activity or program is categorically excluded from NEPA review under an agency's NEPA procedures, the Agency Official shall determine if it still qualifies as an undertaking requiring review under section 106 pursuant to §800.3(a). If so, the Agency Official shall proceed with Section 106 review in accordance with the procedures in this subpart.

(c) *Use of the NEPA process for section 106 purposes.* An Agency Official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with section 106 in lieu of the procedures set forth in §§800.3 through 800.6 if the Agency Official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

(1) *Standards for developing environmental documents to comply with section 106.* During preparation of the EA or Draft EIS (DEIS) the Agency Official shall:

(i) Identify consulting parties either pursuant to §800.3(f) or through NEPA scoping process with results consistent with §800.3(f);

(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the Agency Official's consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors;

(iii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;

(iv) Involve the public in accordance with the agency's published NEPA procedures; and

(v) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.

(2) *Review of environmental documents.*

(i) The Agency Official shall submit the EA, DEIS or EIS to the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, and other consulting parties prior to or when making the document available for public comment. If the document being prepared is a DEIS or EIS, the Agency Official shall also submit it to the Council.

(ii) Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or Native Hawaiian organization, another consulting party or the Council may object to the Agency Official that preparation of the EA, DEIS or EIS has not met the standards set forth in §800.8(c)(1) or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS or EIS is inadequate. If the Agency Official receives such an objection, the Agency Official shall refer the matter to the Council.

(3) *Resolution of objections.* Within 30 days of the Agency Official's referral of an objection under §800.8(c)(2)(ii), the Council shall notify the Agency Official either that it agrees with the objection, in which case the Agency Official shall enter into consultation in accordance with §800.6(b)(2) or seek Council comments in accordance with §800.7(a), or that it disagrees with the objection, in which case the Agency Official shall continue its compliance with this section. Failure of the Council to respond within the 30 day period shall be considered disagreement with the objection.

(4) *Approval of the undertaking.* If the Agency Official has found during the preparation of the EA, DEIS or EIS that the effects of the undertaking on historic properties are adverse, the

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Agency Official shall specify in the FONSI or the ROD the proposed measures to avoid, minimize or mitigate such effects and ensure that the approval of the undertaking is conditioned accordingly. The Agency Official's responsibilities under Section 106 and the procedures in this subpart shall then be satisfied when either the proposed measures have been adopted through a binding commitment on the agency, the applicant or other entities, as appropriate, or the Council has commented and received the response to such comments under § 800.7. Where the NEPA process results in a FONSI, the Agency Official must adopt such a binding commitment through a Memorandum of Agreement drafted in compliance with § 800.6(c). Where the NEPA process results in an EIS, the binding commitment does not have to be in the form of a Memorandum of Agreement drafted in compliance with § 800.6(c).

(5) *Modification of the undertaking.* If the undertaking is modified after approval of the FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties, or if the Agency Official fails to ensure that the measures to avoid, minimize or mitigate adverse effects (as specified in either the FONSI or the ROD, or in the binding commitment adopted pursuant to § 800.8(c)(4)) are carried out, the Agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§ 800.3 through 800.6 will be followed as necessary.

§ 800.9 Council review of Section 106 compliance.

(a) *Assessment of Agency Official compliance for individual undertakings.* The Council may provide to the Agency Official its advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the Agency Official's compliance with the procedures under this part. The Council may provide such advice at any time at the request of any individual, agency or organization or on its own initiative. The Agency Official shall consider the views of the

Council in reaching a decision on the matter in question.

(b) *Agency foreclosure of the Council's opportunity to comment.* Where an Agency Official has failed to complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of an undertaking, the Council's opportunity to comment may be foreclosed. The Council may review a case to determine whether a foreclosure has occurred. The Council shall notify the Agency Official and the agency's Federal Preservation Officer and allow 30 days for the Agency Official to provide information as to whether foreclosure has occurred. If the Council determines foreclosure has occurred, the Council shall transmit the determination to the Agency Official and the head of the agency. The Council shall also make the determination available to the public and any parties known to be interested in the undertaking and its effects upon historic properties.

(c) *Intentional adverse effects by applicants—(1) Agency responsibility.* Section 110(k) of the Act prohibits a Federal agency from granting a loan, loan guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. Guidance issued by the Secretary pursuant to section 110 of the Act governs its implementation.

(2) *Consultation with the Council.* When an Agency Official determines, based on the actions of an applicant, that section 110(k) is applicable and that circumstances may justify granting the assistance, the Agency Official shall notify the Council and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained